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Tucson paving company violated NLRA by firing and immediately rehiring employee

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Section 7 of the National Labor Relations Act (NLRA) provides that employees have the right to engage in concerted activities for their mutual aid or protection. To ensure Section 7 rights are not thwarted by employers, Section 8(a)(1) of the NLRA makes it unlawful for employers to interfere with, restrain, or coerce employees in the exercise of their rights by making statements, engaging in conduct, or taking adverse employment actions such as discipline or discharge. When does an employer's conduct thwart Section 7 and violate Section 8(a)(1)? Is the discharge of an employee that is almost immediately rescinded by the employer sufficient to infringe on the employee's Section 7 rights? A three-member panel of the National Labor Relations Board (NLRB) recently found that the owner of an Arizona paving company engaged in unfair labor practices in violation of Section 8(a)(1) by taking action against its workers.

Background

Bates Paving & Sealing, Inc., operates an asphalt paving and maintenance business in Tucson. In 2014, the company had approximately 25 employees, including laborers Juan Gaxiola, Juan Marana, and Rafael Gastelum. In April 2014, president and owner Robert Bates hired Robert Padilla as a supervisor. Shortly thereafter, some employees, including Gaxiola, Marana, and Gastelum, complained to each other about Padilla's abusive treatment, including yelling, cursing, and using racial epithets.

On September 19, several employees, including Gaxiola, Marana, and Gastelum, were assigned to work on a paving job with Padilla. That morning, the employees complained to Padilla that the ground was wet in some areas and was unsuitable for paving. Padilla yelled at the employees and told them to pave the damp areas anyway. At the end of the day, Padilla and Gaxiola got into an argument, and Gaxiola asked for an immediate meeting with Bates. During the meeting, the employees discussed the damp conditions of the job and complained about Padilla's mistreatment of them. Bates told the employees that he would talk to Padilla and that they ultimately needed to listen to Padilla because he was their supervisor.

On September 22, Padilla terminated Gaxiola's employment for allegedly failing to finish his assigned task on September

19, leaving the job slightly early, and performing poorly. On September 23, Bates scheduled a meeting with the crew to discuss Gaxiola's early departure and the overall workmanship at the paving project. During the meeting, Marana spoke up, stating that the issues were related to Padilla's mistreatment of the employees and his demand that they pave the damp areas. Bates yelled and cursed at Marana, told him that he was fired, and instructed him to leave. Marana did not leave the meeting. After the meeting, Bates told Marana he was not fired, and Marana returned to the jobsite the next day without missing any pay.

On October 1, Padilla issued Gastelum a warning for unsatisfactory performance based on his allegedly unsafe unloading of equipment that resulted in damage to a dump truck. On October 10, Padilla fired Gastelum for poor performance on a raking assignment that was allegedly improperly completed the previous day.

Gaxiola, Marana, and Gastelum filed a charge with the NLRB alleging the company engaged in unfair labor practices. The NLRB filed a complaint on behalf of the employees alleging that Bates and Padilla threatened them with termination or discharged them because they complained about Padilla's mistreatment and criticism of their work performance. An administrative law judge (ALJ) found that Gaxiola's discharge was a violation of Section 8(a)(1), Marana was not discharged, and Gastelum was lawfully discharged. A three-member NLRB panel reviewed the ALJ's decision and reversed the rulings on Marana's and Gastelum's firings.

No harm, no foul? Nope

The employees had complained among themselves about what they considered rude, demeaning, and unprofessional remarks and mistreatment by Padilla. When the mistreatment became too much, the employees met with Bates to express their concerns about Padilla and to implore him to stop the yelling and cursing. Under the NLRA, the complaints to Bates were concerted protected activity concerning the employees' conditions of employment and were sufficient to invoke the protections of Section 7. Thus, it was unlawful for the company to take adverse action against them to interfere with that activity.

The panel overruled the ALJ's decision that Bates rescinding Marana's discharge did not result in a violation of Section 8(a)(1). The panel determined that the events violated the

NLRA and focused on what message Marana's "discharge" sent to other employees who were at the meeting. The panel stated: "The message has been sent that the employer is willing to take . . . extreme action and the employee victim is likely to understand that a 'change of heart' may not come so quickly, if at all, if he again engages in protected concerted activity." Accordingly, the panel did not allow the company to avoid sanctions simply by reversing Marana's discharge before he suffered financial losses.

Deviation from progressive discipline = pretext

The panel also reversed the ALJ's determination that Gastelum's discharge was lawful. The panel reiterated: "Concerted activity directed toward rude, belligerent, and overbearing behavior by a supervisor that directly affects employees' work constitutes protected activity under the Act." Thus, when Gastelum expressed concern about Gaxiola's termination and who was next, he engaged in protected concerted activity. Bates knew about Gastelum's protected concerted activity given his comments during the September 23 meeting. The only remaining issue was whether Gastelum could demonstrate that there was animus toward him when he was fired. The panel disagreed with the ALJ and determined that he could do so.

First, at the September 23 meeting, Bates threatened to fire employees who had spoken up during the meeting, including Gastelum. Second, the timing of Gastelum's termination—2½ weeks after the meeting—was indicative of animus. The panel stated that the company's reason for Gastelum's discharge was a pretext (excuse). The panel noted that his termination "was both a departure from established disciplinary practice and disparate treatment" based on the company's failure to follow its progressive discipline policy and the apparent lack of discipline issued to the employee who was responsible for the poor raking (i.e., merely directing him to rake the area again). Accordingly, Gastelum's termination also violated Section 8(a)(1).

Practical tips

First, the NLRA applies to both union and nonunion workplaces. Employees in nonunion workplaces are protected in a wide range of circumstances if they assert their right to engage in protected concerted activity (e.g., have a discussion regarding the terms or conditions of their employment).

Be careful when making statements that could be viewed to dissuade employees from exercising their rights. For employers, there is a fine line between a permissible statement and a prohibited statement. If your employees engage in protected concerted activity, consult with counsel for talking points and permissible statements addressing concerns regarding the terms and conditions of their employment. Address those concerns carefully.

Review disciplinary and termination decisions prior to implementing them to ensure they are not motivated by animus toward employees who engage in protected activity. Ask whether the company uniformly enforces the policy resulting in the disciplinary or discharge decision. Be consistent.

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